Supreme Court, U.S.
FILED

(1)

No. 03- 04 15 JUN 30 2004

IN THE

Supreme Court of the United States

AT&T CORP., *et al.*,

Petitioners,

v.

UNITED STATES TELECOM ASSOCIATION, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit Circuit

PETITION FOR A WRIT OF CERTIORARI

DONALD B. VERRILLI, JR.
MARK D. SCHNEIDER
MARC A. GOLDMAN
MICHAEL B. DESANCTIS
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

WILLIAM SINGLE, IV
JEFFREY A. RACKOW
MCI
1133 19th Street, N.W.
Washington, DC 20036
(202) 736-6933

Counsel for MCI, Inc.

DAVID W. CARPENTER*
SIDLEY AUSTIN BROWN & WOOD LLP
Bank One Plaza
10 S. Dearborn
Chicago, IL 60603
(312) 853-7000

DAVID L. LAWSON
PAUL J. ZIDLICKY
C. FREDERICK BECKNER III
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Counsel for AT&T Corp.

* Counsel of Record

June 30, 2004

[Additional Counsel Listed on Inside Cover and Front Pages]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

LEONARD J. CALI
LAWRENCE J. LAFARO
AT&T CORP.
900 Routes 202/206 North
Bedminster, NJ 07921
(908) 532-1850

Counsel for AT&T Corp.

CAROL ANN BISCHOFF
JONATHAN D. LEE
COMPTEL/ASCENT
1900 M Street, N.W.
Suite 800
Washington, D.C. 20036-3508
(202) 296-6650

Counsel for CompTel/ASCENT (formerly the Competitive Telecommunications Association)

DENNIS D. AHLERS
SENIOR ATTORNEY
ESCHELON TELECOM, INC.
730 2nd Avenue South,
Suite 1200
Minneapolis, MN 55402
(612) 436-6249

Counsel for Eschelon Telecom, Inc.

SARA F. LEIBMAN
MICHAEL H. PRYOR
MINTZ LEVIN COHN FERRIS GLOVSKY & POPEO, P.C.
701 Pennsylvania Avenue, NW
Suite 900
Washington, D.C. 20004
(202) 434-7300

Counsel for NuVox, Inc.

CARL S. NADLER
STUART M. RENNERT
ADELIA S. BORRASCA
HELLER EHRMAN WHITE & MCAULIFFE LLP
1666 K Street, N.W.
Suite 300
Washington, DC 20006
(202) 912-2575

Counsel for Covad Communications Company

PRAVEEN GOYAL
COVAD COMMUNICATIONS COMPANY
600 14th Street, N.W.
Suite 750
Washington, DC 20005
(202) 220-0400

Counsel for Covad Communications Company

ROSE MULVANEY
VICE PRESIDENT OF
REGULATORY AFFAIRS
BIRCH TELECOM, INC.
2020 Baltimore Avenue
Kansas City, MO 64108
(816) 300-3731

Counsel for
Birch Telecom, Inc.

THOMAS M. KOUTSKY
Z-TEL COMMUNICATIONS,
INC.
1200 19th Street, N.W.
Suite 500
Washington, DC 20036
(202) 955-9652

Counsel for
Z-Tel Communications,
Inc.

ROBERT J. AAMOTH
BRAD MUTSCHELKNAUS
JOHN J. HEITMANN
JENNIFER M. KASHATUS
KELLEY DRYE &
WARREN LLP
1200 19th Street, NW
Suite 500
Washington, DC 20036
(202) 955-9600

Counsel for XO
Communications, Inc.

ALBERT H. KRAMER
JACOB S. FARBER
GREGORY D. KWAN
DICKSTEIN SHAPIRO MORIN
& OSHINSKY LLP
2101 L Street, N.W.
Washington, DC 20037-1526
(202) 785-9700

Counsel for Birch Telecom, Inc.

CHRISTOPHER J. WRIGHT
TIMOTHY J. SIMEONE
HARRIS, WILTSHIRE &
GRANNIS LLP
1200 18th Street, N.W.
Washington, DC 20036
(202) 730-1300

Counsel for
Z-Tel Communications, Inc.

ROBERT J. AAMOTH
BRAD MUTSCHELKNAUS
JENNIFER M. KASHATUS
KELLEY DRYE & WARREN LLP
1200 19th Street, NW
Suite 500
Washington, DC 20036
(202) 955-9600

Counsel for
Xspedius Communications, LLC

CHARLES C. HUNTER
GENERAL COUNSEL
CATHERINE M. HANNAN
DEPUTY GENERAL
COUNSEL
BRIDGECOM
INTERNATIONAL, INC.
115 Stevens Avenue
Third Floor
Valhalla, NY 10595
(914) 468-8214

Counsel for
BridgeCom International, Inc.

ROBERT J. AAMOTH
BRAD MUTSCHELKNAUS
KELLEY DRYE & WARREN
LLP
1200 19th Street, NW
Suite 500
Washington, DC 20036
(202) 955-9600

Counsel for
KMC Telecom III, LLC, and Talk America Inc.

GENEVIEVE MORELLI
KELLEY DRYE & WARREN LLP
1200 19th Street, NW
Suite 500
Washington, DC 20036
(202) 955-9600

Counsel for
the Promoting Active Competition Everywhere ("PACE") Coalition and InfoHighway Communications Corporation

JASON D. OXMAN
GENERAL COUNSEL
ASSOCIATION FOR LOCAL
TELECOMMUNICATIONS
SERVICES
888 17th Street, N.W.
Suite 1200
Washington, DC 20036
(202) 969-2587

Counsel for
Association for Local Telecommunications Services

ANDREW D. LIPMAN
RUSSELL M. BLAU
RICHARD M. RINDLER
PATRICK J. DONOVAN
JOSHUA M. BOBECK
SWIDLER BERLIN SHEREFF
FRIEDMAN, LLP
3000 K Street, N.W.
Washington, DC 20007
(202) 424-7500

Counsel for
Allegiance Telecom, Inc.,
Cbeyond Communications,
El Paso Networks, L.P.,
Focal Communications
Corporation,
LDMI Telecommunications, Inc.,
McLeodUSA Telecommunications
Services, Inc.,
Mpower Communications Corp.,
RCN Telecom Services, Inc.,
TDS Metrocom, LLC

QUESTIONS PRESENTED

In the Telecommunications Act of 1996, Congress made the creation of local competition an end in itself. The Act thus authorizes new entrants to lease elements of the incumbents' network that are "expensive" to replicate and to use these elements to provide any telecommunications service. *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467 (2002); *accord AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999). This case arises because the D.C. Circuit has adopted a view of the Act that was repudiated by *AT&T* and *Verizon* and, indeed, that was set forth in the dissenting opinion in *Verizon*. The questions presented are:

1. Whether the D.C. Circuit correctly held that broad access to network elements in accord with the literal terms of the Act undermines the Act's "goal" of fostering facilities investment, and that the FCC cannot require this access unless it satisfies extra-statutory requirements and "balances" the "benefits" of competition against these "costs"?

2. Whether the D.C. Circuit correctly held that, despite the FCC's findings that local competition will be impaired, the FCC can eliminate access to monopoly elements by finding that competition from a single cable television monopolist is sufficient to meet the Act's goals, and "suggesting" that preventing further competition might "incent" increased future broadband investments by incumbent local telephone monopolists?

3. Whether the D.C. Circuit violated the Act and this Court's decisions by vacating national impairment findings for mass market switching and dedicated transport because the FCC failed to meet extra-statutory requirements?

4. Whether the D.C. Circuit correctly held that the FCC cannot authorize state commissions to grant exceptions to national unbundling requirements in markets where the states find that FCC unbundling standards are not satisfied?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding below in the District of Columbia Circuit Court are listed in Appendix D at A1060a-62a.

Pursuant to Supreme Court Rule 29.6, petitioners state as follows:

AT&T Corp. AT&T Corp. ("AT&T") has no parent company, and no publicly held company owns 10% or more of AT&T's stock.

MCI, Inc. MCI, Inc. ("MCI," formerly known as WorldCom, Inc.) has no parent corporations, and no publicly held corporation owns 10% or more of MCI's stock.

Allegiance Telecom, Inc. Allegiance Telecom, Inc. ("Allegiance") has no parent company, and no publicly held company owns 10% or more of the stock of Allegiance. Allegiance and various of its subsidiaries currently are operating under chapter 11 of the United States Bankruptcy Code, and have entered into a transaction by which XO Communications, Inc. ("XO") would acquire the stock and substantially all of the assets of Allegiance's operating companies that provide telecommunications services.

CompTel/ASCENT Alliance. The CompTel/ASCENT Alliance (formerly the Competitive Telecommunications Association) ("CompTel/ASCENT") has no parent companies, and no publicly held company owns 10% or more of the stock of CompTel/ASCENT.

Cbeyond Communications, LLC. Cbeyond Communications, LLC ("Cbeyond") has no parent corporation and has no publicly issued stock or debt.

El Paso Networks, L.P. El Paso Networks, L.P. ("El Paso") is partially owned by El Paso Corporation, which is

publicly traded on the New York Stock Exchange under the symbol "EP". No public company owns more than 10% of the El Paso Corporation.

Focal Communications Corporation. Focal Communications Corporation ("Focal"), has no parent corporations, and no publicly held corporation holds more than 10% of Focal's stock.

LDMI Telecommunications, Inc. LDMI Telecommunications, Inc. ("LDMI") has not issued any public stock, and LDMI has no parent corporations that have issued public stock.

McLeodUSA Telecommunications Services, Inc. McLeod USA Telecommunications Services, Inc. ("McLeodUSA") is a wholly owned indirect subsidiary of McLeodUSA Incorporated.

Mpower Communications Corp. Mpower Communications Corp. ("Mpower") is a wholly owned subsidiary of Mpower Holding Corporation.

RCN Telecom Services, Inc. RCN Telecom Services, Inc.'s ("RCN") ultimate parent company is RCN Corporation. Level 3 Delaware Holdings, Inc. and NSTAR Communications each hold a 10% or greater interest in RCN.

TDS Metrocom, LLC. TDS Metrocom, LLC ("TDS Metrocom") is an indirect subsidiary of Telephone and Data Systems, Inc.

Z-Tel Communications, Inc. Z-Tel Communications, Inc. ("Z-Tel") is 100% owned by Z-Tel Technologies, Inc., a publicly traded corporation listed on the NASDAQ exchange under the symbol "ZTEL." No publicly held company holds a 10% or greater ownership interest in Z-Tel Technologies, Inc.

Eschelon Telecom, Inc. Eschelon Telecom, Inc. ("Eschelon") has no parent corporations. Eschelon is a privately held

corporation and no publicly traded company owns 10% or more of its stock.

BridgeCom International, Inc. BridgeCom International, Inc. ("BridgeCom") is a wholly-owned subsidiary of BridgeCom Holdings, Inc. BridgeCom Holdings, Inc. has recently been acquired through merger. MCG IH II, Inc., the company that now holds 100% of the outstanding stock in BridgeCom Holdings, Inc., is not publicly traded. The corporate parent of MCG II, Inc., MCG Capital Corporation, is publicly traded.

Birch Telecom, Inc. Birch Telecom, Inc. ("Birch"), is a privately held Delaware corporation.

KMC Telecom III, LLC. KMC Telecom III, LLC ("KMC"), is wholly owned by its parent company, KMC Telecom Holdings, Inc. KMC Telecom Holdings, Inc. is a privately held corporation.

NuVox, Inc. NuVox, Inc. ("NuVox"), has no parent corporation. NuVox is a privately held corporation. The following entities hold 10% or more of NuVox's stock: NSHI Ventures LLC ("Ventures"), Wachovia Corporation ("Wachovia") and M/C Ventures Partners V, L.P. ("MC Partners"). Venture's managing member and 98% owner is KKR Fund L.P., an investment fund. Wachovia is a multi-bank holding company. MC Partners is controlled by its general partner, M/C VP V, L.L.C., an investment company.

Talk America Inc. Talk America Inc. ("Talk America") is a wholly owned subsidiary of Talk America Holdings, Inc., a publicly traded corporation organized under the laws of the State of Delaware. American International Group, Inc., a publicly traded company, owns a 10% or greater equity interest in Talk America Holdings, Inc.

Promoting Active Competition Everywhere. The Promoting Active Competition Everywhere ("PACE") Coalition is

an unincorporated trade association representing competitive local telecommunications service providers.

InfoHighway Communications Corporation. InfoHighway Communications Corporation ("InfoHighway") has no parent corporation and is a privately held corporation. No publicly-held company owns a 10% or greater ownership interest in InfoHighway.

Covad Communications Company. Covad Communications Company ("Covad") is a California corporation that is also the d/b/a for DIECA Communications, Inc., a Virginia corporation. Covad and DIECA Communications, Inc. are wholly-owned subsidiaries of Covad Communications Group, Inc., which is a publicly traded corporation. Covad Communications Group, Inc. has no parent corporation. No publicly held company has a 10% or greater ownership interest in Covad Communications Group, Inc.

Association for Local Telecommunications Services. The Association for Local Telecommunication Services ("ALTS") is a national trade association representing providers of competitive local telecommunications services. ALTS certifies that it has no parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public.

XO Communications, Inc. XO Communications, Inc. ("XO") does not have a parent company, and there are no publicly traded corporations that hold an equity interest of 10% or greater in XO.

Xspedius Communications, LLC. Xspedius Communications, LLC ("Xspedius") is a privately held company. Xspedius' parent companies are Xspedius Management Co., LLC and Xspedius Holding Co., LLC. There are no publicly held companies that own 10% or more of the stock of Xspedius.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION 14

I. THE D.C. CIRCUIT'S DECISION TO UPHOLD THE FCC'S BROADBAND RULES CONFLICTS WITH THIS COURT'S DECISIONS IN *AT&T* AND *VERIZON* AND IS OTHERWISE CONTRARY TO THE ACT'S TERMS AND STRUCTURE 15

II. THE VACATUR OF THE SWITCHING AND TRANSPORT RULES CONFLICTS WITH *AT&T*, *VERIZON*, AND OTHER DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEALS 22

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Page

AT&T Corp. v. *Central Office Tel. Corp.*, 524 U.S. 214 (1998) 21
AT&T Corp. v. *FCC*, 220 F.3d 607 (D.C. Cir. 2000) 9
AT&T v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999) ..... *passim*
Batterton v. *Francis*, 432 U.S. 416 (1977) 28, 29, 30
Heckler v. *Campbell*, 461 U.S. 458 (1983) 26
Iowa Utils. Bd. v. *FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd in part and aff'd in part on other grounds sub nom. AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999) 27
Mobil Oil Exploration & Producing Southeast Inc. v. *United Distrib. Cos.*, 498 U.S. 211 (1991) 26
Puerto Rico Tel. Co. v. *Telecommunications Regulatory Bd.*, 189 F.3d 1 (1st Cir. 1999) 29
Reno v. *ACLU*, 521 U.S. 844 (1997) 14
Texas Office of Pub. Util. Counsel v. *FCC*, 183 F.3d 393 (5th Cir. 1999) 28
United States Telecom Ass'n v. *FCC*, 290 F.3d 415 (D.C. Cir. 2002) ..... *passim*
Verizon Communications, Inc. v. *FCC*, 535 U.S. 467 (2002) ..... *passim*
Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 (1978) 25
Wisconsin Dep't of Health & Family Servs. v. *Blumer*, 534 U.S. 473 (2002) 29, 30

STATUTES AND REGULATION

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 2
47 U.S.C. § 160 ..... 2, 21
§ 251 ..... *passim*
§ 252 ..... 1, 3, 4, 29, 30

TABLE OF AUTHORITIES – continued

Page

47 U.S.C. § 261 30
§ 271 4
47 C.F.R. § 51.317(b)(1) 5

ADMINISTRATIVE DECISIONS

Echo Star Communications Corp. (*EchoStar-DirecTV Merger Order*), 17 FCC Rcd. 20559 (2002) 21
Deployment of Wireline Servs. (*Line Sharing Order*), 14 FCC Rcd. 20912 (1999) 6
2002 Biennial Regulatory Review (*Mass Media Order*), 18 FCC Rcd. 13620 (2003), *aff'd in part, remanded in part on other grounds, Prometheus Radio Project* v. *FCC*, 2004 WL 1405975 (3d Cir. June 24, 2004) 21
Qwest Communications Int'l, Inc. (*Qwest 9 State Order*), 17 FCC Rcd. 26303 (2002) 4
Implementation of the Local Competition Provisions of the Telecomms. Act of 1996 (*Remand Order*), 15 FCC Rcd. 3696, *modified on other grounds*, 15 FCC Rcd. 1760 (1999) 5, 6, 17, 27

The undersigned competitive local exchange carriers (CLECs) respectfully petition for certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals (A1a-65a) is reported at 359 F.3d 554. The *Order* of the Federal Communications Commission (A66a-1035a) is reported at 18 FCC Rcd. 16978, as corrected by an errata reported at 18 FCC Rcd. 19020.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 2004. This Court extended the time for filing petitions for certiorari to and including June 30, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Telecommunications Act of 1996 are reproduced at A1036a-59a.

STATEMENT OF THE CASE

In the Telecommunications Act of 1996, Congress made the creation of competition in monopoly local telephone markets an "end in itself" and sought to give "aspiring competitors every possible incentive to enter local telephone markets, short of confiscating the incumbents' property." *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467, 476, 489 (2002) (*Verizon*). Towards this end, Congress authorized competitive carriers to lease "unbundled" elements of the incumbents' local networks at cost-based rates and to use these elements to offer competing telecommunication service. 47 U.S.C. §§ 251(c)(3), 252(d)(1). The Act provides that, in determining the elements that are to be made available, the

FCC is to "consider" "at a minimum" whether denial of access would "impair" the ability of the telecommunications carrier seeking access to offer the services it seeks to provide. *Id.* § 251(d)(2). The Act imposes stringent limitations on the authority of the FCC to remove the unbundling requirements for any element in any market. *Id.* §§ 160(a), (d).

Because of the fundamental importance of these requirements to the national economy, this Court has addressed basic questions under these provisions in two prior decisions. *Verizon*, *supra*; *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999) (*AT&T*). The Court upheld the FCC's authority to adopt "promiscuously" broad unbundling requirements – subject only to a requirement that it give some effect to the term "impair" – and the Court rejected claims that broad unbundling at cost-based rates inhibits facilities investment and defeats the Act's goals.

This case arises because the D.C. Circuit has adopted a view of this Act that was expressly rejected in *AT&T* and *Verizon*, and that, indeed, was set forth in the *dissenting* opinion in *Verizon*. Based on its view that unbundling inherently creates disincentives to facilities investment and is contrary to the "goals" of the Act, the D.C. Circuit has here (1) upheld FCC rules that deny access to quintessential natural monopoly facilities necessary to offer competitive "broadband" services that are the future of telecommunications, and (2) vacated FCC rules that grant access to facilities that today provide narrowband services. Unless reversed, this decision will transform today's competitive "broadband" market into a monopoly in much of the nation and a duopoly of the local telephone and cable television monopolists elsewhere. It will also jeopardize competitive "narrowband" services now being provided to over 20 million residential and business customers.

The 1996 Act. In the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56 (47 U.S.C. § 251 *et seq.*), Congress sought to introduce competition into

local telephone services that had long been intractable monopolies. Congress recognized that no prospective entrant could now replicate the entire local network infrastructure owned by an incumbent local exchange carrier (ILEC). As this Court has stated, ownership of network facilities gives ILECs "an almost insurmountable competitive advantage" over would-be competitors. *Verizon*, 535 U.S. at 490. It stated that this advantage is most pronounced in the case of "local loop[s]" that connect each home and business to the network, and that the ILECs can equally foreclose competition in facilities that the incumbents have hardwired to the local loops. *Id.*

Congress thus imposed on each ILEC an "obligation . . . to share its network with competitors" under the terms prescribed by 47 U.S.C. § 251(c). *AT&T*, 525 U.S. at 371. The central network-sharing provision of the Act is § 251(c)(3). It provides that a new entrant may "access" (*i.e.*, lease) "elements" of an incumbent's network on an "unbundled basis" and at rates that are just and reasonable and based on the cost of providing the element. 47 U.S.C. § 251(c)(3); *see id.* § 252(d)(1). Section 251(d)(2) states: "In determining what network elements should be made available for purposes of [§ 251(c)(3)], the Commission shall consider, at a minimum, whether . . . access to such network elements as are proprietary is *necessary*," and whether, as to non-proprietary elements, "the failure to provide access to such network elements would *impair* the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." *Id.* § 251(d)(2) (emphasis added). All the elements at issue here are nonproprietary and subject to the less stringent "impair" test.

The actual rights and duties of incumbents and competing carriers are established by "interconnection agreements" that are established by state commissions. If an incumbent and a competing carrier are unable to reach a negotiated agreement, the Act provides that the relevant state commission shall

"arbitrat[e]" all "open issues" between the parties by applying the "requirements of section 251, including the regulations" adopted by the FCC. *Id.* § 252(c).

Under the Act's terms, the creation of local competition is both an end in itself and an essential precondition to removal of the prohibitions on the provision of long distance service by the nation's four dominant incumbent local exchange carriers (the Bell operating companies). *Id.* § 271. The FCC has now granted applications of these incumbents to provide long distance service in every state, finding that competitors can lease narrowband and broadband capabilities of loops, switching and dedicated transport at cost-based rates and use them to offer ubiquitous local services. *See, e.g., Qwest 9 State Order*, 17 FCC Rcd. 26303 ¶¶ 172-311 (2002).

The FCC's Initial Rules And *AT&T*. In August 1996, the FCC adopted its initial rules for implementing the local competition provisions of the 1996 Act. The FCC designated seven components of the incumbents' networks as network elements and authorized state commissions to add elements to this list. The FCC also required incumbents to lease pre-assembled combinations of all elements.

In *AT&T*, the Court vacated and remanded the FCC's list of network elements on the ground that the FCC had failed to give any effect whatever to the "necessary" and "impair" criteria of § 251(d)(2). The Court held that the FCC had erroneously read § 251(c)(3) as requiring incumbents "to provide all network elements for which it is technically feasible to provide access" and treated § 251(d)(2) as merely authorizing the FCC to "create isolated exemptions from some underlying duty to make all network elements available." 525 U.S. at 391 (emphasis omitted). The Court held that the FCC had therefore diluted § 251(d)(2) to the point of meaninglessness by refusing to consider whether competitors could obtain elements outside the incumbents' networks and by treating impairment as established by any cost or quality difference, no matter how trivial. *Id.* at 389-

90. This Court held that, on remand, the FCC must "determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements." *Id.* at 391-92 (emphasis omitted).

Recognizing that the FCC might then adopt the same list of network elements under a lawful impairment standard, the Court went on to address the incumbents' challenges to rules that allowed CLECs to access "every component of the network" without supplying any facilities on their own. *Id.* at 392. The Court rejected the claim that these rules "undermined the 1996 Act's goal of encouraging entrants to develop their own facilities." *Id.* at 376. It held that the Act does not impose "a facilities-ownership requirement" on CLECs and in fact "suggests the opposite." *Id.* at 392. This Court stated that the Act authorizes the FCC to grant the "most promiscuous" rights to competing carriers "vis-à-vis the incumbents." *Id.* at 397.

In a separate concurrence, Justice Breyer took issue with the Court's understanding of the Act's terms and purposes. He stated that "compulsory sharing" defeats the Act's goals by inhibiting investments and that the FCC must narrowly cabin unbundling in order to strike a "balance" between the statute's purportedly competing purposes. *Id.* at 428.

The FCC's 1999 Rules And *Verizon*. On remand from *AT&T*, the FCC adopted a new impairment standard. *Remand Order*, 15 FCC Rcd. 3696 (1999). It deemed a competing carrier to be "impaired" if, "taking into consideration the availability of alternative elements outside the incumbent LEC's network . . . lack of access to that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer." 47 C.F.R. 51.317(b)(1). Under this standard, the FCC removed some elements from the national list, but maintained access requirements that allowed competing carriers to obtain loops, transport, and switching. In a separate order, the FCC authorized competitive carriers

to lease only the "high frequency" portions of the loop, which is used to provide "broadband" services known as DSL. *Line Sharing Order*, 14 FCC Rcd. 20912 (1999).

The FCC rejected the incumbents' arguments that granting these access rights would have adverse effects on investment in network facilities. *Remand Order* ¶¶ 112, 137-38. Numerous ILECs filed petitions for review in the D.C. Circuit, and the review of both orders was consolidated.

While those petitions were pending, this Court issued its decision in *Verizon*, which reversed the Eighth Circuit's decision that invalidated the FCC's "TELRIC" pricing rules for unbundled elements. The Court addressed the same claims the incumbents raised in their D.C. Circuit challenge to the scope of unbundling – *i.e.*, that making these unbundled elements available at TELRIC rates "may simulate the competition envisioned by the Act but does not induce it" and "perversely creates incentives against competition in fact." 535 U.S. at 503. The Court rejected these claims, holding that both economic theory and actual experience foreclosed claims that unbundling at TELRIC rates has adverse effects on investment. *Id.* at 507-17. Justice Breyer dissented, reiterating the views set forth in his separate opinion in *AT&T*. *Id.* at 539-63 (Breyer, J., dissenting).

The D.C. Circuit's *USTA I* Decision. Eleven days after this Court issued *Verizon*, the D.C. Circuit granted the ILECs' petitions for review of the FCC's 1999 *Remand Order* and separate *Line Sharing Order*. *United States Telecom Ass'n* v. *FCC*, 290 F.3d 415 (D.C. Cir. 2002) (*USTA I*).

The court acknowledged that the FCC had given some effect to the term "impair" and that Congress "gave no detail as to either the kind or degree of impairment" that would justify mandatory unbundling. *Id.* at 421-22. However, the D.C. Circuit concluded that *AT&T* had "implicitly" adopted the view set forth in Justice Breyer's separate opinion in that case that the broad availability of elements at TELRIC rates

has inherent disincentive effects on investment and fosters only "completely synthetic competition," contrary to the "goals" of the Act. *Id.* at 424, 427, 429. It thus held that the statute's "purposes" prohibited the FCC from ordering unbundling merely upon a finding that the ability of competitors to offer service otherwise would be "impaired" within the ordinary mean of that term and that it was insufficient that the FCC had "adher[ed]" to the "letter of" § 251(d)(2). *Id.* at 429. Instead, the court of appeals held that the FCC must strike a "balance" in which it limited the scope of unbundling to that reasonably necessary to permit some competition of the "sort" that Congress might have intended and in which the FCC did not "inflict on the economy the sort of costs noted by Justice Breyer." *Id.* at 424-30.

To effectuate its view of the Act's purposes, *USTA I* imposed a series of extra-statutory restrictions on the scope of permissible unbundling. Specifically, the court held that the FCC (1) must make market-by-market findings of impairment that account for the effects of any existing implicit universal service subsidies and that end unbundling in any markets where the goals of the Act can otherwise be met; (2) cannot consider genuine cost disadvantages that new entrants face if they are "universal" and are not "linked" to natural monopoly characteristics of elements being sought; and (3) must consider if the competition provided by even a single facilities-based competitor to the incumbent carrier (the local cable system that offers broadband services that are competitive with DSL over its monopoly cable facilities) is sufficient to meet the Act's objectives in any market. *Id.*

The FCC's *Order*. In the *Order* at issue, the FCC sought to comply with the mandate of *USTA I* and adopted a new and strict impairment standard. Under it, competitive impairment can be found only "when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic." A161a (¶ 84). The FCC

applied this standard to make national findings of impairment or nonimpairment for different categories of loops, transport, and switching network elements.

Loops. The FCC found that deployment of loop (and other transmission) facilities is severely constrained by "steep economic barriers." A275a (¶ 199). These include the substantial economies of scale associated with the transmission plant, the high sunk costs of deploying such plant, and other ILEC "first-mover advantages." A295a-312a, A453a-56a (¶¶ 222-239, 371).

The FCC found that the only generic conditions in which these steep entry barriers could be overcome were for very high capacity "OCn" loops that are the equivalent of thousands of individual telephone lines and that are used by very large business ("enterprise") customers at very high volume locations. The FCC made national findings of nonimpairment for these loops. A386a-88a (¶ 315). Conversely, it made national findings of impairment for the DS3 loops (equivalent to 672 lines) and DS1 loops (equivalent to 24 lines) used by enterprise customers as well as the single line voice grade (DS0) loops used by residential and small business ("mass-market") customers. A318a, A391a-92a, A395a-97a (¶¶ 248, 320, 325).

Dedicated Transport. These are transmission facilities that connect switching offices to one another. The FCC found that the entry barriers to the deployment of these transmission facilities could be overcome only on high volume point-to-point routes (having more than 12 DS3s of capacity). It made national findings of nonimpairment for dedicated transport above those capacity levels (A473a-74a (¶ 388)), and it made national findings of impairment for dedicated transport below these thresholds. (A470a, A477a (¶¶ 386, 390)).

Switching. The FCC found that CLECs may be impaired in *using* switches to serve a class of customers if their loops are "hardwired" to the incumbents' switches and if the switches

thus share the natural monopoly characteristics of the loop. A553a-56a (¶¶ 464-465). The FCC found no impairment for the provision of switching to enterprise customers served by digital loops. A539a (¶ 451). But it made a national finding of impairment for mass market switching. It found that these customers' loops are ubiquitously hardwired to the incumbents' switches, and that there is no efficient and economical means of breaking this hardwired connection and reconnecting the loop to the switch of the CLEC – a process called a "hot cut." A553a-68a (¶¶ 464-471).

This finding relied on the actual marketplace experience of CLECs that had deployed some 1300 switches, that had "every incentive" to use them to serve mass market customers (A532a (¶ 447 n.1365)), and that had attempted to do so. They had abandoned these marketing efforts because customers rejected service that requires hot cuts (A525a, 526a-27a, A532a, A556a-60a (¶¶ 438, 440, 447 n.1365, 466-468)) – even at the low volume of orders that had been placed and even when hot cuts met performance standards used to evaluate applications for long distance authority.[1] A523a-27a, A572a-73a (¶¶ 437-444, 475). The FCC also predicted that incumbents could not process the radically greater volumes of hot cut orders that would result if unbundled switching were ended. A564a (¶ 469 & n.1437).

The FCC found that it "could end" its switching impairment analysis with this finding of impairment under existing conditions. A507a (¶ 423). However, it directed state commissions to try to develop new "bulk" cutover processes that could ameliorate the entry barriers that the hot cut process today creates, and authorized them to end

---

[1] In finding incumbents' hot cut processes met the requirement of § 271 that loops be available unbundled from switching, the FCC had relied solely on determinations that the ILEC had satisfied performance "metrics" that state commissions had established, and the FCC did not assess the commercial viability of services that depended on such hot cuts. *AT&T Corp.* v. *FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000).

unbundled switching in any markets where a bulk hot cut process eliminated impairment. A572-73a (¶ 474).

Broadband Capabilities Of Loops. The FCC found that CLECs are impaired without unbundled access to loops to serve mass-market customers "whether they seek to provide narrowband or broadband services, or both." A318a (¶ 248). But it denied CLECs access to the "broadband" capabilities of local DS0 loops used to serve mass-market customers. A232a-32a, A341a-64a (¶¶ 253-263, 272-297).

Specifically, the FCC eliminated access to (1) broadband capabilities of "hybrid" copper-fiber loops that serve a large (30%) and growing percentage of the nation's telephones (A342a-64a (¶¶ 285-297)); (2) broadband (and in some cases all) capabilities of any "fiber-to-the-home" (FTTH) loops that incumbents deploy in the future (A342a-64a (¶¶ 273-297)); and (3) the high frequency portion of loops (the practice known as "line sharing") (A326a-40a (¶¶ 255-269)). CLECs had been connecting these broadband capable loops to their own packet switching networks that represent billions of dollars of investment and using them to provide DSL, other high speed data services, and certain voice services.

These restrictions rest, in whole or in part, on the ground that ending or diminishing CLEC competition would provide ILECs with greater returns and thus purportedly give them greater incentives to make new broadband loop investments. A331a, A332a, A348a-49a, A356a-57a, A362a (¶¶ 261, 263, 278, 290, 295). The FCC concluded that this action was authorized because a "goal" of an uncodified provision of the Telecommunications Act of 1996 (§ 706) is to promote broadband investment and that it was irrelevant that § 706 requires that actions to promote broadband deployment also promote local competition. A253a-54a (¶ 176); *see* A354-57a (¶¶ 288, 290). It found that the existence of cable modem competition mitigated the significance of the loss of competition from other CLECs. A358a-59a (¶ 292). However, it declined to maintain broadband unbundling for

the 25% of residential customers and 75% of business customers that do not have cable modem service or in other areas where the reasons for the FCC's rule do not apply.

The Role of the States. The evidence before the FCC consisted of aggregated data reflecting conditions that existed nationally and permitted the FCC to identify the generic conditions in which CLECs would, and would not, be impaired if denied access to particular elements. The FCC found repeatedly that the record contained insufficient evidence to determine whether unique conditions would justify exceptions to its generic determinations in any geographic markets. A213a, A486a, A508a-11a, A587a-89a, A596a-97a (¶¶ 131, 399, 424-425, 485, 493). But the FCC believed that the court of appeals' decision in *USTA I* required these determinations. *E.g.*, A265a-66a (¶ 188). Because "states are better positioned than [the FCC] to gather and assess the necessary information" (*id.*), the FCC directed state commissions to analyze local conditions and to lift the ILECs' unbundling obligations for transport and switching in any market in which they found no impairment under standards that the FCC specified (A467-68a, A471a-73a, A479a-80a, A570a-71a (¶¶ 384, 387, 392, 473)).

The Decision Below. The FCC's *Order* was reviewed by the same panel that had decided *USTA I*.

First, the court vacated the FCC's switching and transport rules. It held that the provisions that allowed states to grant localized exceptions to the unbundling requirements constituted an unauthorized delegation of FCC authority. A9a-16a. It then held that the national impairment findings for mass market switching and dedicated transport could not stand independently. Without acknowledging the FCC's finding that it had insufficient information to make more "granular" findings itself, or the principle that agency rules can be based on conditions that exist generally, the court vacated these findings on the ground that the FCC may not "'loftily abstract[] away from all specific markets,'" but must

instead implement a "'more nuanced concept of impairment.'" A16a (quoting *USTA I*, 290 F.3d at 423, 426).

The court also expressed "doubt" that the national impairment findings otherwise could stand. It stated that the FCC had failed to comply with *USTA I*'s requirement that the FCC "explor[e] the possibility of more nuanced alternatives and reasonably reject[] them." A19a; *see also* A6a. Further, although the FCC had offered specific justifications for refusing to consider tariffed services (A30a-32a) and the impact of universal service subsidies (A24a-25a), the court held that these justifications were insufficient because the FCC had failed to "confront" certain issues.

Second, in sharp contrast to its detailed scrutiny of FCC rules requiring unbundling, the D.C. Circuit upheld the FCC's rules that eliminated unbundling for the broadband capabilities of loops under an extraordinarily deferential standard. The court of appeals assumed that CLECs would suffer impairment by reason of each of these new broadband rules (A35a, A37a (hybrid loops); A44a (FTTH); A46a (line sharing)) and that it thus was unlikely that CLECs would provide broadband service at all without access to unbundled loops. The court noted that there was evidence (unaddressed by the FCC) that the result of the rules would be higher prices for consumers. A41a. But the court of appeals rejected the CLECs' claim that it is contrary to the Act's terms and structure for the FCC to deny unbundling in the face of impairment and to risk creating monopolies or duopolies in order to try to "incent" greater investment by ILECs. It held that § 706 of the Act and its prior decision in *USTA I* permits the FCC to balance away the benefits of local competition in order to achieve greater investment by ILECs. A35a-37a.

The D.C. Circuit also rejected the CLECs' claim that the FCC must show that there will be definite and concrete benefits before it can deny unbundling in the face of findings of impairment. To the contrary, the court held that the existence of broadband competition from the cable television

monopolist in some markets satisfied the minimum requirements of the Act and that the FCC's ban on competition through unbundled monopoly loops is valid unless the FCC's findings or the record affirmatively established that no future investments or other "benefits" could result from eliminating competition through leased loops. A39a-42a. The court thus upheld the rules on the ground that there were tenuous and speculative "suggestions" of theoretical future benefits.

The D.C. Circuit's rationale for upholding the ban on access to hybrid copper-fiber loops is illustrative. The court acknowledged that the record foreclosed any notion that eliminating unbundling obligations would lead to greater ILEC fiber investment in these loops. So the court relied on the fact that the provision of broadband also required what all conceded was a "modest" ILEC investment in electronic equipment known as "line cards." A39a-40a. The undisputed evidence was that ILECs had made this investment in over 80% of lines – which ILECs had upgraded for DSL over the past five years in response to cable modem and CLEC competition. CLEC Pet. Br. 22-25; CLEC Reply Br. 15-17. However, the court of appeals held that it sufficed that the FCC had made a "suggestion" – by citing, without endorsing, an ILEC contention -- that the "regulatory environment" had "deterred" such investments in the past. A39a-40a (*citing Order* ¶ 290 & n.838 (A356a-57a)).

The D.C. Circuit also relied on the FCC's statements that installing fiber in hybrid fiber-copper loops would be a step in the direction of deployment of all-fiber loops to homes. The court acknowledged that there are virtually no such "fiber to the home" (FTTH) loops and that there is not now consumer demand sufficient to justify their construction. A40a, A44a. But it thought the speculative possibility that they might be constructed in the future (and that denying access to hybrid loops would incent their construction) justified denying access to hybrid loops that exist now and that serve over 30%

of customer lines. A40a. In this regard, the court did not respond to the CLECs' assertion that even if "incenting" FTTH were a basis for denying unbundling, FTTH is addressed by a separate rule and has no possible relevance to rules governing the hybrid copper-fiber loops.

Finally, whereas the court vacated national unbundling rules for the FCC's failure to address "market-specific variations," the D.C. Circuit did not address the CLECs' claim that there had to be exceptions to the national rules denying broadband loop access in markets where the justifications for this rule did not exist. For example, because all these rules relied on the existence of cable modem service, the CLECs argued that there had to be an exception to the access ban for the 25% of residential and 75% of business customers to whom cable modem services is not offered. Similarly, they argued that the FCC could not suppress local competition in order to incent deployment of DSL "line cards" in the 80% of the locations in which ILECs have already deployed line cards.

REASONS FOR GRANTING THE PETITION

Review of the D.C. Circuit's judgment is manifestly proper and necessary. This Court has held that the 1996 Act is an "unusually important legislative enactment" (*Reno* v. *ACLU*, 521 U.S. 844, 857 (1997)) that "fundamentally restructures local telephone markets" (*AT&T*, 525 U.S. at 371) and that "profoundly affects a crucial segment of the economy worth tens of billions of dollars," (*id.* at 397). Here, the D.C. Circuit has decided fundamental questions involving the scope of the statute in a manner that conflicts with this Court's decisions in *AT&T* and *Verizon*, with other decisions of this Court, and with decisions of other courts of appeals. And the decision has enormous consequences for the national economy. It will transform the provision of local "broadband" services – that are now used for high speed Internet access and that will be used for all telecommunications in the future – into a

monopoly in some areas and an ILEC-cable television duopoly elsewhere. The decision further jeopardizes service to some 20 million mass market customers now served through unbundled switching and to millions of business lines now served through dedicated transport.

I. THE D.C. CIRCUIT'S DECISION TO UPHOLD THE FCC'S BROADBAND RULES CONFLICTS WITH THIS COURT'S DECISIONS IN *AT&T* AND *VERIZON* AND IS OTHERWISE CONTRARY TO THE ACT'S TERMS AND STRUCTURE.

The first two questions raised in the petition are challenges to the standard that the D.C. Circuit applied in upholding the FCC rules that deny access to the broadband capabilities of monopoly loops. First, this standard rests on a view of the Act that was rejected in *AT&T* and then was rejected in the starkest terms in *Verizon*: that even when unbundling satisfies a strict impairment standard, it defeats the goals of the Act by undermining facilities investment. Second, the D.C. Circuit's specific holding that competition can be eliminated in order to incent investment by *ILECs* is contrary to the Act's terms and structure and to *Verizon*.

1. The fundamental premise of the D.C. Circuit's decision is that broad unbundling of network elements at TELRIC rates inherently creates disincentives to investment that are contrary to the Act's "goal" of fostering facilities investment. Correlatively, the D.C. Circuit dismisses the competition that results from leasing monopoly loops and other facilities as "synthetic" "piggy-back[ing]" on ILEC facilities that has little value and that must be sharply distinguished from the "genuine, facilities-based competition" that is the "prefer[ed]" objective of the Act. A24a, 30a, 36a. This was the view Justice Breyer expressed in his separate opinion in *AT&T* (and reiterated in his dissent in *Verizon)*, and the D.C. Circuit concluded that the Court "implicitly" accepted this view in *AT&T*. *USTA I*, 290 F.3d at 427.

Based on this premise, the D.C. Circuit has held that the "discouragement of investment in innovation" is a "cost of unbundling" that the FCC must take into account in making unbundling determinations in one of two ways. A222a. It either must "narrowly define impairment as natural monopoly," or may "adopt a broader definition of impairment" and narrow the scope of unbundling by invoking extra-statutory factors through "§ 251(d)(2)'s 'at a minimum' language." A22a-23a; *accord* A36a-37a. The court thus concluded that "robust" competition provided by a single cable television company over its monopoly cable lines is sufficient to satisfy the Act's objectives (A41a) and that, in this circumstance, cost-based access to monopoly ILEC facilities cannot be granted merely because CLECs are impaired within the "literal" meaning of § 251(d)(2). *USTA I*, 290 F.3d at 427-29. Rather, the FCC must "balance" the benefits of greater competition against the diminished investment and innovation and other costs that, in the court's view, presumptively result from any unbundling requirement.

For this same reason, the D.C. Circuit has held that CLECs have no entitlement to unbundled access in this circumstance unless they affirmatively demonstrate that the investment "goals" of the Act will not be undermined and that there is no possible "benefit" from denying access. A39a-42a. Conversely, if there is a possible investment or other "benefit" from denying unbundling – no matter how speculative, remote, or attenuated – an FCC order that ends unbundled access will be upheld. Thus, because of the presumed harms to investment that result from unbundling, the court of appeals held that the FCC's "suggestions" of possible benefits were enough to justify the rules that deny CLECs access to the broadband capabilities of unbundled loops. A37a-42a, A44a-45a, A46a-47a.

But the premise of the D.C. Circuit's holding has been squarely rejected by this Court. It was rejected in *AT&T* in 1999. 525 U.S. at 392 ("the 1996 Act imposes no [facilities-

ownership requirement]; if anything, it suggests the opposite"). Then, it was repudiated by *Verizon* in the most unequivocal terms 11 days before the D.C. Circuit issued its decision in *USTA I*.

In particular, *Verizon* categorically rejected claims that access to elements at TELRIC rates has any inherent adverse effect on investment. First, this Court rejected claims that unbundling will eliminate incentives for CLECs to invest even in the facilities that they have rights to lease. The Court noted that CLECs will want to eliminate "[]dependence on an incumbent's management" and facilities. 535 U.S. at 508. The FCC has in fact found that, for this reason, CLECs will invest in alternative facilities whenever it is "close" to economic to do so, and that rather than disincent investment, leasing gives CLECs the information and customers necessary to make these investments. *Remand Order* ¶ 112.

Further, *Verizon* recognized that unbundling fosters CLEC investment even if CLECs did not ever invest in alternatives to the bottleneck facilities that they lease. Unbundled access to shared facilities *enables* CLECs to invest in other "unshared" facilities that are essential to the provision of the finished downstream service. 535 U.S. at 509-10 & n.27. For example, the earlier FCC rules that allowed access to broadband capabilities of loops led to billions of dollars in CLEC investments in packet switches and associated facilities that are required to provide high speed Internet access and other broadband services over loops. *See id.* at 516. These loops are quintessential bottleneck facilities, and the FCC's impairment findings establish that it is unlikely that CLECs would enter these markets at all if there were no unbundled access. That underscores that unbundling leads to investments and competition that would not otherwise occur – which is why *Verizon* dismissed the incumbents' charge (accepted by the D.C. Circuit) that the provision of service through unbundled elements is "parasitic free riding" and not genuine competition that benefits consumers. *Id.* at 504. It also

underscores the extraordinary investments that will be stranded unless this Court reverses the decision below.

Verizon also held that the incumbents' contrary claim "founders on fact" because the CLECs had made some $55 billion in investments in alternative facilities in the prior four years. *Id.* at 517. Ironically, the D.C. Circuit noted these same empirical facts. However, it thought them insufficient to establish that unbundling has no adverse effects on investment and held that before the FCC could order broad unbundling, it had to demonstrate that there would not have been still greater investment "in the absence of the prospect of unbundling." *USTA I*, 290 F.3d at 425. But this is the very inquiry this Court dismissed as "speculat[ion]." *Verizon*, 535 at 517; *see infra* p. 19 n.2. This Court held that a regime that "boast[s] such substantial competitive capital spending" cannot be "described as an unreasonable way to promote competitive investment." *Verizon*, 535 U.S. at 517.

Further, even if disincentives to investment would arise, this Court held that that it was not "obviously unreasonable" for the FCC to "induce [potential entrants] to compete in less capital-intensive facilities," rather than "risk keeping more potential entrants out" of the market. *Id.* at 510. The Act's overriding "goal" is local competition, which the Act makes an "end in itself" regardless of whether investment does or does not occur. *Id.* at 476.

The focus of the discussion of *Verizon* was on investment incentives for CLECs, not ILECs. But in addition to holding that ILECs are entitled to rates that reflect all the risks they incur in making innovative investments (*id.* at 517-22), the Court dismissed any claims relating to incumbent investment. It said it is "commonsense" that "so long as" some CLECs engage in facilities-based competition, ILECs "will continue to have incentives to invest and to improve their services to hold on to their existing customer base." *Id.* at 517 n.33.

This is not to say that effects on investment cannot be considered by the FCC in making unbundling determinations (although denying unbundling of monopoly facilities to incent investment by incumbents is antithetical to the Act, *see infra*). The point is that adverse effects on investment cannot be presumed to result from unbundling or treated as established on the basis of the vague "suggestions" and speculation relied upon by the D.C. Circuit. Rather, whether there are adverse effects is a question of empirical fact and policy that requires substantial evidence and a reasoned analysis that reflect assessments of the overall effects of unbundling on investment in both shared and unshared facilities. Notably, when the FCC conducted *that* analysis below, it found that there was no empirical support for the claims that unbundling had adverse effects on overall investment.[2]

2. The D.C. Circuit's decision to uphold the broadband rules is not merely premised on a view about investment incentives and the Act's goals that was rejected in *Verizon* and *AT&T*. The court of appeals upheld rules that denied CLECs access to quintessential bottleneck facilities – the local loops that connect individual homes and businesses to the telephone network – on the ground that eliminating CLEC competition will result in greater returns for ILECs and may incent them to make greater broadband investments.

The FCC acknowledged that neither the uncodified § 706 nor any other provision of the Act authorized the FCC to adopt measures that advance broadband infrastructure investment by reducing local competition (A248a-51a,

---

[2] Below, CLECs introduced regression studies that showed that overall investment is increased by the availability of network elements. While the ILECs submitted studies that reached the opposite conclusion, the CLECs reran the studies to include data from the states that ILECs had excluded and the rerun studies, too, showed that broad unbundling leads to greater investment. The FCC found that all these studies were flawed in some respects, and did not find that unbundling inhibits investment. A257a-58a, A532a-35a, A536a-39a (¶¶ 178 & n.576, 447 & n.1365, 449-50).

A253a-54a (¶¶ 173 & n.557, 176-177)). But the FCC held that the "at a minimum clause" of § 251(d)(2) allowed the FCC to advance the "goals" of the uncodified § 706. While the D.C. Circuit agreed that § 706 justified the FCC's actions, it held that the goal of promoting greater investment would justify this measure even if § 706 did not exist. A36a-37a

This holding conflicts with *Verizon* and with the Act. Absent some explicit statutory authorization, it is simply antithetical to the 1996 Act's terms and structure for the FCC to balance away the benefits of competition based on *ad hoc* determinations that ILEC monopolies (or cable-ILEC duopolies) are more likely to lead to improvements in broadband infrastructure or other benefits than is competition through leased loops. Under the Act, the creation of local competition is both "an end in itself and an important step towards achieving the Act's goals of boosting competition in broader markets" – *i.e.*, the long distance market that ILECs were allowed to enter only after opening narrowband and broadband service to competition. *Verizon*, 535 U.S. at 476; *see supra*, p. 4. In this regard, the only way the D.C. Circuit could distinguish *Verizon* was by misstating the foregoing quotation and ignoring its clear meaning – that the benefits of local competition cannot be balanced away based on nothing more than vague public interest determinations. A36a.

The D.C. Circuit's holding is contrary to the Act's very structure. Section 251(c)(3) is designed to foster *both* competition by CLECs and investment and innovation by ILECs by (1) granting CLECs access to monopoly inputs at regulated rates and (2) guaranteeing ILECs network element rates that compensate them for all the risks incumbents incur in upgrading and modernizing their plant. *Verizon*, 535 U.S. at 518-19. In this regard, the D.C. Circuit acknowledged that the FCC could protect its stated interests through its network pricing rules, while preserving access to loops and broadband competition. But the court asserted, without any support, that

the Act also gives the FCC the option of denying access to bottleneck facilities before it revises its pricing rules. A38a.

The D.C. Circuit ultimately relied on the ground that § 251(d)(2) provides that the FCC shall consider impairment "at a minimum" in making unbundling determinations. But this phrase establishes no more than that the FCC may consider other factors that are consistent with the Act's terms, structures, and goals. It is not a license for the FCC to decide that monopoly or duopoly will better protect the Act's goals than will the competition that Congress has made an "end in itself."[3] If it did, the Act's local competition provisions could be rendered meaningless by the FCC, contrary to the principle that a statute cannot be construed to "destroy itself." *AT&T Corp.* v. *Central Office Tel. Corp.*, 524 U.S. 214, 228 (1998).

Other provisions of the Act reinforce that the phrase "at a minimum" must be construed in this manner. Under § 10 of the Act, the FCC may "forbear" from applying § 251(c)(3) only if it has been "fully implemented," and the FCC may not eliminate unbundling requirements unless it finds that they are no longer necessary to ensure that rates are "just, reasonable, and nondiscriminatory" and to protect the interests of consumers. 47 U.S.C. § 160(a), (d). That determination can focus on the competitive effects of eliminating access. *Id.* § 160(b). If the FCC could end unbundling in the face of impairment on the ground that monopoly returns are needed to incent ILEC investment, it would never need to forbear and meet the requirements of § 10 of the Act. The "at a minimum" phrase in § 251(d)(2) cannot be construed to allow elimination of unbundling where, as here, forbearance could not be authorized.

---

[3] Indeed, the FCC has found that duopolies cannot drive prices and service to competitive levels. *EchoStar-DirecTV Merger Order*, 17 FCC Rcd. 20559, ¶ 103 (2002); *Mass Media Order*, 18 FCC Rcd. 13620, ¶ 289 (2003).

Finally, the uncodified § 706 is irrelevant. Although the "at a minimum" phrase allows the FCC to eliminate unbundling in the face of impairment if that were authorized by, or necessary to implement, some other statutory provision, the FCC admits (A253a-54a (¶ 177)) that § 706 of the 1996 Act is not such a provision. In particular, while it exhorts the FCC to promote broadband infrastructure investment, it directs the FCC to do so through means that also promote "local competition." *Id.* Thus, while there are some actions the FCC could take under § 706 if ILECs had inadequate incentives to invest in broadband loops (*see supra*), denying access to monopoly loops and eliminating local competition is not one of them. For all these reasons, the Court should grant review of the first two questions presented and of the D.C. Circuit's decision upholding the FCC's broadband rules.

II. THE VACATUR OF THE SWITCHING AND TRANSPORT RULES CONFLICTS WITH *AT&T*, *VERIZON*, AND OTHER DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEALS.

The vacatur of the FCC's "narrowband" switching and transport rules rests on the grounds (1) that the delegation to the states is unlawful and (2) that the national impairment findings for these elements could not stand after the state role was ended. Both holdings conflict with the prior decisions of this Court and will, unless reversed, impair or even prevent the competition that is the object of the 1996 Act.

1. First, the FCC's national impairment findings for mass market loops and switching are valid, whether or not the delegation to the states is upheld. In vacating these findings, the D.C. Circuit relied on the same view of the effects of unbundling and of the Act's purposes that (as shown in Part I, *supra*) was rejected in *AT&T* and *Verizon*.

But under these decisions, the D.C. Circuit's analysis should have begun and ended with its acknowledgment that the FCC's determinations rested on permissible

interpretations of the statute's text. The Act authorizes national unbundling requirements for the non-proprietary elements at issue here when the FCC finds that the "failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2). The D.C. Circuit has acknowledged that the Act "gave no detail as to either the kind or degree of impairment" that justifies unbundling of an element at cost-based rates. *USTA I*, 290 F.3d at 422. Under the Act's terms, the FCC can order the national unbundling of an element if it finds – giving some substance to "impair" – that the ability of a single carrier to provide services will be impaired if access to the element is denied.

Here, the FCC manifestly gave some substance to the impairment requirement. It found impairment only where there are "barriers to entry" that are "likely to make entry into a market uneconomic" by efficient CLECs if they are required to self-provision an element or obtain it from sources other than the incumbent. *Compare* A161a (¶ 84), *with AT&T*, 525 U.S. at 392. The FCC also explained that its impairment analysis would, as far as practicable, consider differences in "customer class, geography, and service" and "type and capacit[y] of facilities." A201-02a (¶ 118).

However, the D.C. Circuit imposed a series of additional conditions designed to limit unbundling to the bare minimum necessary to allow some type of competition in each market and which, the court stated, meant that the FCC's "task" would be one of "extraordinary complexity." *USTA I*, 290 F.3d at 421. In addition to being unsupported by the Act's text, these requirements are inconsistent with its structure. The Act limits any extraordinary justifications only to a subset of elements – "proprietary" elements – that are subject to a test of necessity. 47 U.S.C. § 251(d)(2). Further, § 251(d)(1) required the FCC, within six months of the 1996 Act's enactment, to "complete all actions necessary to

establish regulations" to implement all the requirements of § 251 – including interconnection, resale, number portability, dialing parity, the rates and terms for access, as well as the list of network elements. So Congress could not have intended to condition the FCC's adoption of network element unbundling rules on findings of "extraordinary complexity."

In any case, the acknowledged ambiguity of § 251(d)(2) should have been the end of the matter. In *AT&T*, this Court declared: "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." 525 U.S. at 397. Thus, reviewing courts "can only enforce the clear limits that the 1996 Act contains." *Id.* The judicial function is not to decide whether the FCC has chosen "the best way" to implement the 1996 Act, but simply to determine "whether the Commission made choices reasonably within the pale of statutory possibility in deciding what . . . items must be leased" as unbundled network elements (*Verizon*, 535 U.S. at 539).

The D.C. Circuit ignored these clear commands. It held that it is not enough that the FCC was "adhering" to a permissible construction of the "letter" of § 251(d)(2). *USTA I*, 290 F.3d at 429. Because it concluded that *AT&T* "implicitly" adopted Justice Breyer's view that broad availability of network elements at TELRIC rates defeats the Act's goal of fostering facilities investment and produces other "costs," the D.C. Circuit held that the purported "goals of the Act" (*id.* at 427) require the FCC to "limit" the scope of unbundling to the bare minimum essential to allow some type of competition – even if the result is unbundling rules that are "under-inclusive[]" (A19a; A5a-A6a). As explained in Part I, the D.C. Circuit's view of the Act's purposes was rejected by *AT&T* and *Verizon*.

AT&T and *Verizon* also foreclose the D.C. Circuit's conclusion that the only permissible end results are FCC rules that limit unbundling to facilities that are "natural monopolies" that cannot be economically replicated by any

firm. A22a. *AT&T* declined to adopt an essential facilities test even for the "proprietary" elements that are subject to a statutory standard of "necess[ity]." *AT&T*, 525 U.S. at 388. *AT&T* held that the Act allows the FCC to grant "promiscuous" unbundling rights. *Id.* at 397. Similarly, *Verizon* stated that the FCC can require sharing of "elements" solely on the ground that they are "costly-to-duplicate" by "hundreds of smaller entrants" that are "without the resources of a large competitive carrier such as AT&T or Worldcom." *Verizon*, 535 U.S. at 510 n.27.

Verizon held that the matters that the D.C. Circuit has resolved as a matter of law are "the stuff of debate for economists and regulators versed in the technology of telecommunications and microeconomic pricing theory." *Id.* at 539. By contrast, "the job of judges" is to ask whether the FCC "made choices within the pale of statutory possibility in deciding what . . . items must be leased." *Id.*

Against this backdrop, each of the D.C. Circuit's grounds for vacating the FCC's national impairment findings conflicts with *AT&T* and *Verizon*. Further, each holding imposes wholly unjustified burdens that threaten to cripple CLECs and eliminate the competition the Act was intended to foster. The court of appeals may not impose heightened procedural or substantive requirements based on its hostility to a statutory policy. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 524-25, 544-48 (1978).

a. *"Nuanced" Impairment Determinations.* First, there is no basis for the D.C. Circuit's holding that the FCC must make "nuanced" market-by-market impairment findings if there is substantial evidence that in most markets every competitor is unable to compete without access to that element. A16a, A19a. Under § 251(d)(2)'s terms, the FCC can order nationwide unbundling of an element if it finds that the ability of a "telecommunications carrier" to provide service would be impaired if access to the element were

denied. The Act does not require a finding that impairment exists in every locale of the country.

Further, there is no statutory imperative that the FCC eliminate all substantial overbreadth from its unbundling requirements. Agencies can adopt national rules based on conditions that exist in the nation generally and address any exceptional conditions in individual markets through the general rules that authorize waivers.[4] Here, the FCC expressly found that the record was insufficient to permit it to make more "granular" findings than those it in fact made. A213a, A486a, A508a-11a, A587a-89a, A596a-92a (¶¶ 131, 399, 424-425, 485, 493). *A fortiori*, it was clearly sufficient for the FCC to find that carriers would be impaired without access to unbundled local switching in the "large majority of locations," and that any "particular instances" where impairment might not exist were not identified in the record. A570a-71a (¶ 473); *see also* A391a-97a, 471a-73a, 477a-80a (¶¶ 320-325, 387, 390-392) (same finding as to transport).

b. *Less Restrictive Alternatives.* The D.C. Circuit also held that the FCC should address "narrowly-tailored alternatives" to unbundling. A20a. These alternatives range from "alternative market definitions" (A28a), to considering new methods of providing hot cuts that might allow 90 day limits on unbundled switching (A20a). The short answer to these holdings, too, is that § 251(d)(2) allows unbundling requirements to be imposed when the FCC finds impairment to a telecommunications carrier – with no requirement that alternatives to unbundling be considered – and the D.C. Circuit's extra-statutory requirements rest on a view of the Act's purposes that *AT&T* and *Verizon* rejected.

c. *Tariffed Services.* The D.C. Circuit was also plainly wrong in holding that the FCC must evaluate whether the

---

[4] *See, e.g., Mobil Oil Exploration & Producing Southeast Inc.* v. *United Distrib. Cos.*, 498 U.S. 211, 226-29 (1991); *Heckler* v. *Campbell*, 461 U.S. 458, 467-68 (1983).

existence of tariffed services that allow access to network facilities at above-cost rates eliminates the need for cost-based access to the facilities as network elements under § 251(c)(3). A30a-32a. Under § 251(d)(2)'s plain terms, the FCC determines whether CLECs would be "impair[ed]" by incumbents' outright "failure to provide access to [the] element," and the statute in no way requires the FCC to assess whether the incumbents' above-cost tariffed services are sufficient to permit competition to develop. The D.C. Circuit's holding also conflicts with a decision of the Eighth Circuit on an indistinguishable issue. *Iowa Utils. Bd.* v. *FCC*, 120 F.3d 753, 809 (8th Cir. 1997), *rev'd in part and aff'd in part on other grounds sub nom. AT&T, supra.*

Moreover, the FCC has repeatedly explained that consideration of tariffed services – which are offered in thousands of individual tariffs that are filed at the state level and that can be unilaterally modified by the ILECs – would create insuperable problems of administration as well as risk vertical price squeezes that would foreclose competition. A182a-84a (¶ 102 & n.340); *Remand Order* ¶¶ 67-70.

d. *Universal Service.* The court of appeals also held the FCC had not justified its findings of "impairment" in "high cost" areas where state regulation holds retail rates below historic costs in order to foster "universal service." A24a-25a. But these findings rest on the ground that that the available revenues are there insufficient to allow CLECs to overcome the nationwide barriers to entry through alternative facilities that the FCC had found to exist. A161a, A618a-19a (¶¶ 84, 517). The FCC also observed that entry through leased network elements will not occur in areas where available revenues are below the costs of service under TELRIC. The D.C. Circuit said this latter statement is insufficient based on its view that TELRIC does not represent the incumbents' costs and that it will undermine state universal service subsidies if there are areas "where TELRIC rates are so low that unbundling *does* elicit CLEC entry." A24a.

However, under § 251(d)(2)'s terms, the FCC has no conceivable obligation to consider exceptions to unbundling obligations because of effects on state-regulated retail rates and state implicit universal service subsidies (that will be eliminated by the competition that the Act creates). The D.C. Circuit's decision conflicts with *AT&T*'s holding that effects on universal service subsidies are irrelevant to unbundling determinations (525 U.S. at 392-93). It also conflicts with *Verizon*'s holding that TELRIC represents appropriate economic costs and with *Texas Office of Public Utility Counsel* v. *FCC*, 183 F.3d 393, 410-13 (5th Cir. 1999) (upholding TELRIC to govern universal service subsidies).

2. The Court should also review the D.C. Circuit's holding that the FCC could not authorize state commissions to grant exceptions to unbundling requirements in markets where they found FCC standards were satisfied. A9a-16a. The D.C. Circuit held that this constituted an unlawful "subdelegation" of authority to states because the 1996 Act does not expressly authorize it. This holding conflicts with prior decisions of this Court.

This Court has held that where, as in the 1996 Act, state authorities have an independent statutory role in the administration of a federal statutory scheme, the authority of federal agencies to delegate other matters to a state is established by the grant of rulemaking jurisdiction to the federal agency. In *Batterton* v. *Francis*, the Court rejected a claim that a federal agency's regulation was invalid "because it delegated the question of coverage [for an unemployment benefit program] to the States." 432 U.S. 416, 423 (1997). There, the federal statute had not expressly authorized delegation of authority to states, but the statutory scheme was one, like the 1996 Act, in which states had an express statutory role in administering other requirements of the federal statutory scheme and in which the scheme was one of "cooperative federalism." *Id.* at 423, 425, 430-31.

Rather than assume a congressional bar on subdelegation unless it was granted expressly, the *Batterton* Court held that courts may "not lightly infer a congressional intention to preclude" federal agencies from delegating issues to states and "recognizing legitimate local policies" in jointly-administered programs built on cooperative federalism. *Id.* at 431-32. Because states possessed this independent statutory jurisdiction over aspects of the general subject matter, this Court held that Congress's direction that unemployment be "'determined in accordance with standards prescribed by the Secretary'" was sufficient to allow the Secretary "to recognize some local options" and to allow determinations of unemployment to be governed by state rules. *Id.* at 430 (quoting 42 U.S.C. § 607(a)).

Likewise, in *Wisconsin Department of Health & Family Services* v. *Blumer*, 534 U.S. 473, 495 (2002), the Court reaffirmed *Batterton*, stating that in interpreting statutes "structured" around the concept of "cooperative federalism," the Court has "not been reluctant to leave a range of permissible choices to the States, at least where the superintending federal agency has concluded that such latitude is consistent with the statute's aims." This Court reiterated that express statutory authority is not required for subdelegations to states and that this authority is inferred when, as here, Congress has granted authority over other "related" issues to states. *Id.* at 495-97.

Like the statutes at issue in *Batterton* and *Blumer*, the 1996 Act is "an exercise in what has been termed cooperative federalism." *Puerto Rico Tel. Co.* v. *Telecommunications Regulatory Bd.*, 189 F.3d 1, 8 (1st Cir. 1999). Under the Act, the states arbitrate and approve the interconnection agreements that actually define the rights of competitors and incumbents. 47 U.S.C. § 252. The Act requires that state commissions do so by applying the requirements of federal law, including the standards in the FCC regulations, to local conditions (*id.* § 252(c)) – while also expressly authorizing

states to establish and enforce additional state law "access and interconnection" rules, so long as they are consistent with the Act's requirements and purposes (*id.* §§ 251(d)(3), 252(e)(3), 261(c)). Because states may "arbitrat[e]" all "open issues" (*id.* § 252(c)), the Act expressly delegates to states the authority to make unbundling determinations in arbitration proceedings or in generic proceedings when the FCC has been unable to make the determination itself or has chosen, for reasons of policy, to adopt standards for states to apply to conditions in each locale (*id.* § 252(c) & § 252(g)). In this regard, while the Act and the FCC's regulations adopt minimum federal requirements, the discretionary decisions of state commissions over network element rates and other terms and conditions of their availability actually determine the extent to which local competition will or will not occur in particular states.

Under *Batterton* and *Blumer*, the states' acknowledged "independent jurisdiction over the general subject matter" (A9a) precludes an inference that Congress banned the FCC's subdelegation. Its lawfulness is thus established by the statutory provision granting the FCC power to adopt the regulations it deems necessary to carry out the Act. The Court should also grant this petition to resolve this conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DONALD B. VERRILLI, JR.
MARK D. SCHNEIDER
MARC A. GOLDMAN
MICHAEL B. DESANCTIS
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

WILLIAM SINGLE, IV
JEFFREY A. RACKOW
MCI
1133 19th Street, N.W.
Washington, DC 20036
(202) 736-6933

Counsel for MCI, Inc.

LEONARD J. CALI
LAWRENCE J. LAFARO
AT&T CORP.
900 Routes 202/206 North
Bedminster, NJ 07921
(908) 532-1850

Counsel for AT&T Corp.

DAVID W. CARPENTER*
SIDLEY AUSTIN BROWN & WOOD LLP
Bank One Plaza
10 S. Dearborn
Chicago, IL 60603
(312) 853-7000

DAVID L. LAWSON
PAUL J. ZIDLICKY
C. FREDERICK BECKNER III
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Counsel for AT&T Corp.

CAROL ANN BISCHOFF
JONATHAN D. LEE
COMPTEL/ASCENT
1900 M Street, N.W.
Suite 800
Washington, D.C. 20036-3508
(202) 296-6650

Counsel for CompTel/ASCENT (formerly the Competitive Telecommuni-cations Association)

DENNIS D. AHLERS
SENIOR ATTORNEY
ESCHELON TELECOM, INC.
730 2nd Avenue South, Suite 1200
Minneapolis, MN 55402
(612) 436-6249

Counsel for Eschelon Telecom, Inc.

CARL S. NADLER
STUART M. RENNERT
ADELIA S. BORRASCA
HELLER EHRMAN WHITE & MCAULIFFE LLP
1666 K Street, N.W.
Suite 300
Washington, DC 20006
(202) 912-2575

Counsel for Covad Communications Company

ROSE MULVANEY
VICE PRESIDENT OF REGULATORY AFFAIRS
BIRCH TELECOM, INC.
2020 Baltimore Avenue
Kansas City, MO 64108
(816) 300-3731

Counsel for Birch Telecom, Inc.

SARA F. LEIBMAN
MICHAEL H. PRYOR
MINTZ LEVIN COHN FERRIS GLOVSKY & POPEO, P.C.
701 Pennsylvania Avenue, NW
Suite 900
Washington, D.C. 20004
(202) 434-7300

Counsel for NuVox, Inc.

PRAVEEN GOYAL
COVAD COMMUNICATIONS COMPANY
600 14th Street, N.W.
Suite 750
Washington, DC 20005
(202) 220-0400

Counsel for Covad Communications Company

ALBERT H. KRAMER
JACOB S. FARBER
GREGORY D. KWAN
DICKSTEIN SHAPIRO MORIN & OSHINSKY LLP
2101 L Street, N.W.
Washington, DC 20037
(202) 785-9700

Counsel for Birch Telecom, Inc.

THOMAS M. KOUTSKY
Z-TEL COMMUNICATIONS, INC.
1200 19th Street, N.W.
Suite 500
Washington, DC 20036
(202) 955-9652

Counsel for Z-Tel Communications, Inc.

ROBERT J. AAMOTH
BRAD MUTSCHELKNAUS
JOHN J. HEITMANN
JENNIFER M. KASHATUS
KELLEY DRYE & WARREN LLP
1200 19th Street, NW
Suite 500
Washington, DC 20036
(202) 955-9600

Counsel for XO Communications, Inc.

CHRISTOPHER J. WRIGHT
TIMOTHY J. SIMEONE
HARRIS, WILTSHIRE & GRANNIS LLP
1200 18th Street, N.W.
Washington, DC 20036
(202) 730-1300

Counsel for Z-Tel Communications, Inc.

ROBERT J. AAMOTH
BRAD MUTSCHELKNAUS
JENNIFER M. KASHATUS
KELLEY DRYE & WARREN LLP
1200 19th Street, NW
Suite 500
Washington, DC 20036
(202) 955-9600

Counsel for Xspedius Communications, LLC

CHARLES C. HUNTER
GENERAL COUNSEL
CATHERINE M. HANNAN
DEPUTY GENERAL
COUNSEL
BRIDGECOM
INTERNATIONAL, INC.
115 Stevens Avenue
Third Floor
Valhalla, NY 10595
(914) 468-8214

Counsel for
BridgeCom International, Inc.

ROBERT J. AAMOTH
BRAD MUTSCHELKNAUS
KELLEY DRYE & WARREN LLP
1200 19th Street, NW
Suite 500
Washington, DC 20036
(202) 955-9600

Counsel for
KMC Telecom III, LLC,
and Talk America Inc.

GENEVIEVE MORELLI
KELLEY DRYE & WARREN
LLP
1200 19th Street, NW
Suite 500
Washington, DC 20036
(202) 955-9600

Counsel for
the Promoting Active
Competition Everywhere
("PACE") Coalition and
InfoHighway
Communications
Corporation

JASON D. OXMAN
GENERAL COUNSEL
ASSOCIATION FOR LOCAL
TELECOMMUNICATIONS
SERVICES
888 17th Street, N.W.
Suite 1200
Washington, DC 20036
(202) 969-2587

Counsel for
Association for Local
Telecommunications
Services

ANDREW D. LIPMAN
RUSSELL M. BLAU
RICHARD M. RINDLER
PATRICK J. DONOVAN
JOSHUA M. BOBECK
SWIDLER BERLIN SHEREFF
FRIEDMAN, LLP
3000 K Street, N.W.
Washington, DC 20007
(202) 424-7500

Counsel for
Allegiance Telecom, Inc.,
Cbeyond Communications.
El Paso Networks, L.P.,
Focal Communications
Corporation,
LDMI Telecommunications, Inc.,
McLeodUSA Telecommunications
Services, Inc.,
Mpower Communications Corp.,
RCN Telecom Services, Inc.,
TDS Metrocom, LLC

June 30, 2004

* Counsel of Record